Supreme Court, U. S.
FILED
DEC 5 1980
MICHAEL RODAK, JR., CLERK

No. 79-1841

In the Supreme Court of the United States

OCTOBER TERM, 1980

GRANDDAD BREAD, INC., PETITIONER

v.

CONTINENTAL BAKING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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This memorandum is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

1. Wholesale bakeries in Seattle, Washington, have long employed their own truck driver-salesmen to deliver bread to retail grocery stores. Those drivers are responsible for making "rack deliveries"—deliveries that require them to stock shelves and remove stale loaves of bread from their customers' stores—and are paid sales commissions as well as salaries. In 1960, one of the bakeries began to allow a retail store to pick up its bread at the bakery's loading dock. When the drivers' collective bargaining contract next came up for renegotiation in 1962, their representative, Teamsters Local 227, insisted on a provision prohibiting such "dock pickups," as well as dock deliveries or dock shipments. This effectively excluded all forms of delivery except

rack delivery (Pet. App. A-11 to A-12). Under the threat of a strike, the bakeries acceded to this provision, which became Article IV of the collective bargaining agreement.

Nine years later, petitioner Granddad Bread, Inc. ("Granddad"), a bread distributing company, sued Continental, four other bakers, and Local 227 for violations of the antitrust laws. It alleged that the defendants, by various acts including the adoption of Article IV of the collective bargaining agreement, conspired to restrain trade and to monopolize commerce in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2.[1] It also claimed that Continental had violated Section 2 of the Sherman Act by monopolization and attempted monopolization. Following a jury trial in the United States District Court for the Western District of Washington, Continental was found liable on the conspiracy charges and not liable on the monopolization and attempted monopolization charges (Pet. App. A-40 to A-42, A-59).[2]

The court of appeals remanded the case for further consideration in light of *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), and *California Dump Truck Owners Ass'n* v. *Associated General Contractors*, 562 F. 2d 607 (9th Cir. 1977) (Pet. App. A-16). The district court then entered judgment n.o.v. in favor of Continental, holding that Article IV was a "valid work preservation clause and therefore could not form the basis of an antitrust claim since no evidence was presented that the clause was unlawfully formulated or applied" (Pet.

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[1]The other defendants named in the complaint settled with petitioner before trial.

[2]Granddad also claimed that Continental had violated the Robinson-Patman Act. The jury agreed, but the district judge set aside the verdict (Pet. App. A-58). Granddad did not take an appeal from this ruling (Pet. App. A-2).

App. A-48). The district court also found that, "aside from Article IV itself, there was no evidence of any agreement between Continental and the Teamsters or any other alleged co-conspirators which could have damaged Granddad in the manner complained of in this action" (*ibid.*).

The court of appeals affirmed (Pet. App. A-1 to A-15). Although Granddad argued that Article IV was not exempt from the prohibitions of the antitrust laws because it violated the labor laws, the court concluded that the clause was legal under Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), and that it had not been misapplied (Pet. App. A-6 to A-8). The court of appeals also agreed with the district court that there was insufficient evidence to support the jury's finding that Continental had conspired with any of the other wholesale bakers (Pet. App. A-9 to A-10).

2. In this Court, Granddad sets forth three related arguments: that Article IV violates Section 8(e) of the National Labor Relations Act (Pet. 24-25, 33); that Article IV, even if lawful under Section 8(e), is part of a broader antitrust conspiracy (Pet. 31, 37); and that Article IV, considered by itself, may be the basis for antitrust liability regardless of its legality under the labor laws (Pet. 24-25). None of these arguments merits consideration by this Court in the present posture of this case.

a. There is no merit to Granddad's assertion (Pet. 31, 33) that Article IV violates Section 8(e) of the National Labor Relations Act, because it has economic effects outside of the bargaining unit. Many lawful work preservation agreements have such effects. See, *e.g.*, *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 615-616 (1967); *NLRB* v. *International Longshoremen's Ass'n*, No. 79-1082 (June 20, 1980), slip op. 15 n.22. The lawfulness of such agreements rests not on the absence of effects outside of the bargaining unit, but on the objectives of the union in entering into the

agreements. *NLRB* v. *International Longshoremen's Ass'n, supra*, slip op. 12-15; *NLRB* v. *Pipefitters Local 638*, 429 U.S. 507 (1977). In the present case, both courts below found that Local 227 had no objective other than preserving its members' jobs (Pet. App. A-8, A-48). There is no need for this Court to review the concurrent findings of both lower courts. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).[3]

b. Granddad also argues that Article IV, even if lawful under Section 8(e), was part of a broader conspiracy "to control price competition by foreclosing price-cutting competitors from the market" (Pet. 34). Both the district court and the court of appeals, however, found insufficient evidence that Article IV was used in this manner, or that any conspiracy to eliminate Granddad existed (Pet. App. A-8 to A-9, A-48). While Granddad obviously disputes these findings, that factual issue does not warrant this Court's review.

c. Finally, there is no reason to grant review of Granddad's contention (Pet. 24-30) that Article IV, standing by itself, may give rise to antitrust liability, even though it does not violate Section 8(e). Petitioner did not so argue in the lower courts. The district court instructed the jury that "no finding of an antitrust violation can be premised solely on the existence of Article IV standing alone," and that Article IV would violate the Sherman Act only if "entered into or used by the parties for anticompetitive purposes other than the union's independent desire to preserve jobs for its members"

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[3]Even though an agreement is aimed at preserving jobs, it still may be an illegal secondary agreement if the employer does not have the right or power to award the work that the union seeks to secure. *NLRB* v. *Pipefitters Local 638*, 429 U.S. 507, 522-528 (1977). The right to control issue was not raised in the lower courts, however, and the court of appeals' observation that "[t]he bakers had the right to control the methods by which their products were delivered to retailers" (Pet. App. A-8) is dictum.

(Pet. App. A-50 to A-52). Granddad did not challenge that instruction on appeal. Instead, it sought reversal in the court of appeals following judgment n.o.v. on the ground that Article IV was illegal under the labor laws and therefore not exempt from the coverage of the antitrust laws. Granddad did not argue that the provision would violate the antitrust laws even if lawful under Section 8(e), and the court of appeals did not address that issue (Pet. App. A-6). There are no exceptional circumstances in this case warranting consideration of an issue that was neither raised in nor decided by the court of appeals. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1980

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[4]Petitioner correctly notes (Pet. 28) that in an amicus curiae memorandum opposing certiorari in *International Longshoremen's Ass'n* v. *Consolidated Express*, No. 78-1902, we described the question of the scope of the labor exemption from the antitrust laws as a "vexing issue." The difficulty of the question is all the more reason not to consider it in a case such as this, in which illumination from the lower courts' opinions is unavailable. Moreover, in the case cited by petitioner, the court of appeals based its ruling on the scope of the antitrust exemption on a finding that there had been a violation of Section 8(e). *Consolidated Express, Inc.* v. *New York Shipping Ass'n*, 602 F. 2d 494 (3d Cir. 1979), judgment vacated, No. 78-1902 (June 30, 1980). No violation of Section 8(e) was found to exist in this case.